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No. 356

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

J. D. LEWIS and ZELMA LEWIS,
Petitioners,

VERSUS

SPENCER CARVER, Trustee,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN B. OSBUN,
1408-9 Liberty Bank Building,
Oklahoma City, Oklahoma,
Attorney for Petitioner.

August, 1955.

INTERSTATE TYPESETTING CO., 18 SO. WALKER, OKLAHOMA CITY, PH. FO 5-8758

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In the

Supreme Court of the United States

OCTOBER TERM, 1955

No. .....

J. D. LEWIS and ZELMA LEWIS,
Petitioners,

VERSUS

SPENCER CARVER, Trustee,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Comes now J. D. Lewis and Zelma Lewis, petitioners, and pray that Writ of Certiorari issue to review the order of the United States Court of Appeals for the Fifth Circuit entered on June 30, 1955, dismissing petitioners' appeal on motion of the appellee.

OPINIONS BELOW

The issues on this petition concern two decisions, being the judgment of the United States District Court for the Northern District of Texas (Dallas Division) and the opinion of the United States Court of Appeals Fifth Circuit dismissing the appeal.

1. The District Court on the 19th day of April, 1954, entered the following order:

"On this the 19th day of April, 1954, came on regularly to be heard the motion by the defendant, J. D. Lewis and wife, Zelma Lewis, to dismiss this case as to such defendants on the ground that there was an identical prior suit in the District Court of Texas, and the Court having heard such motion and argument of counsel, and being of the opinion that such motion should be denied,

"It Is Therefore Ordered by the Court that the motion to dismiss by the defendant J. D. Lewis and wife, Zelma Lewis, be and the same is hereby denied with the costs of such motion taxed to said defendant, J. D. Lewis and wife, Zelma Lewis.

"Wm. H. Atwell,
United States District Judge."

2. The District Court on the 2nd day of June, 1954, denied the following request for a jury trial:

"MOTION AND REQUEST FOR JURY TRIAL.

"Comes now the defendants, J. D. Lewis and Zelma W. Lewis and shows to the Court that the issues presented by the pleadings filed in this case are of such a nature that the trial of the cause should be by jury. These defendants, therefore, under Rule 38 of the Federal Rules of Civil Procedure now demand for jury trial in this case.

"Wherefore, these defendants, J. D. Lewis and Zelma W. Lewis, pray that this cause and all of the issues involved herein be presented before a jury.

"JOE B. THOMPSON,
Attorney for Defendants, J. D. Lewis and Zelma W. Lewis."

without entering a written order, but the trial judge stated from the bench that he would take a pen and mark through the request and refuse the same, so there is no formal order on the motion and request for a jury trial.

3. The United States District Court entered on the 2nd day of June, 1954, the following order as shown in appendix, pages i to vii.

4. Motion for New Trial was filed and overruled.

5. Motion to Stay Execution was filed and overruled, and the following orders entered by the court:

(Title Omitted.)

"On this the 17th day of May, 1954, came on regularly to be heard the motion of the defendant United States of America to dismiss this cause as to such defendant, and the Court having heard such motion and argument of counsel and being of the opinion that such motion should be denied.

"It is Therefore Ordered by the Court that the motion to dismiss the defendant United States of America be and the same hereby is denied.

"WM. H. ATWELL,
United States District Judge.

"Approved as to form:

"JOHN C. FORD,
Assistant U. S. Attorney."

"ORDER OVERRULING MOTION FOR NEW TRIAL.

(Title Omitted.)

"On this the 28th day of June, 1954, came on regularly to be heard the Motion for New Trial by the de-

fendants, J. D. Lewis and Zelma W. Lewis, and the movants came not, and came the respondents and announced ready on such motion, and the Court having heard such motion and the argument of counsel and being of the opinion that such motion should be overruled,

"It is Therefore Ordered, Adjudged and Decreed that the Motion for New Trial of the defendants, J. D. Lewis and Zelma W. Lewis be and the same is hereby denied.

"WM. H. ATWELL,
United States District Judge.

"Approved as to form:

"SPENCER CARVER,
Attorney for Plaintiff.

"JOHN C. FORD,
Attorney for United States.

"Ted P. MacMaster,
Attorney for City of Dallas.

"J. J. FAGAN,
Attorney for County of Dallas."

"ORDER DENYING STAY OF EXECUTION.

(Title Omitted.)

"On this the 28th day of June, 1954, came on regularly to be heard a motion of the defendants, J. D. Lewis and Zelma W. Lewis, to stay execution in this cause for sixty days from the entry of judgment on June 8, 1954, and the movants came not and came the respondents and announced ready and the Court having heard such motion and the argument of counsel and being of the opinion that such motion should be denied

"It Is Therefore Ordered, Adjudged, and Decreed that the motion to stay execution by the defendants, J. D. Lewis and Zelma W. Lewis, be and the same is hereby denied.

"WM. H. ATWELL,
United States District Judge.

"Approved as to Form:

"SPENCER CARVER,
Attorney for Plaintiff.

"TED P. MacMASTER,
Attorney or City of Dallas.

"J. J. FAGAN,
Attorney for County of Dallas.

"JOHN C. FORD,
United States Attorney."

6. No notice of appeal was filed.

7. Thereafter a Motion to Vacate the Judgment was filed, Motion to Set Aside Sale was filed, Motion for Order to Remove Personal Property was filed, and the following formal order was entered by the United States District Court as follows:

"ORDER OVERRULING MOTIONS TO VACATE JUDGMENT, TO SET ASIDE SALE AFTER JUDGMENT AND TO REMOVE PERSONAL PROPERTY.

(Title Omitted.)

"On this the 29th day of November, 1954 came on regularly to be heard motions by J. D. Lewis, defendant to vacate the judgment herein, to set aside the sale after judgment and to remove personal prop-

erty and came movant and announced ready and came Spencer Carver, Trustee, one of the respondents and announced ready and the Court proceeded to hear such motions, the evidence offered thereunder, and the argument of counsel and being of the opinion and finding that such motions and each of them should be in all things overruled and denied.

"It Is Therefore Ordered, Adjudged and Decreed that the motion to vacate the judgment herein by the defendant, J. D. Lewis be and the same is hereby in all things overruled and denied.

"It Is Further Ordered, Adjudged and Decreed by the Court that the motion of J. D. Lewis, defendant herein to set aside the sale after judgment herein be in all things overruled and denied.

"It Is Further Ordered, Adjudged and Decreed by the Court that the motion of J. D. Lewis, defendant herein to remove personal property from real estate heretofore sold under the judgment herein be and the same is hereby in all things overruled, and denied.

"It Is Further Ordered, Adjudged and Decreed by the Court that all costs of such motion be and the same is hereby taxed to the defendant, J. D. Lewis and for which let execution issue.

"To which findings and orders of the Court the said defendant, J. D. Lewis then and there in open Court duly excepted.

"WM. H. ATWELL,
United States District Judge.

"Approved as to form:

"SPENCER CARVER,
(Spencer Carver),
Trustee, Respondent.

"JOHN B. OGDEN,
(John B. Ogden),
Attorney for Movant,
J. D. Lewis."

8. Notice of appeal was thereafter given which is as follows:

"NOTICE OF APPEAL TO COURT OF APPEALS FIFTH CIRCUIT.

"Filed Dec. 7, 1954.

"In the United States District Court for the Northern District of Texas, Dallas Division.

"Spencer Carver, Trustee, Plaintiff,

v. No. 5511—Civil.

"United States of America, et al., Defendants.

"Notice is hereby given that J. D. Lewis, one of the defendants in the above styled and numbered cause hereby appeals to the Court of Appeals for the Fifth Circuit from the Order of this Court entered herein on the 29th day of November, 1954, wherein said Court by its Order overruled and denied the Motion to Vacate the Judgment filed by the defendant, J. D. Lewis; wherein the Court by said Order overruled and denied the Motion of J. D. Lewis, defendant herein, to set aside sale after judgment; wherein the Court overruled and denied the motion of J. D. Lewis, defendant herein, to remove personal property from real estate heretofore sold under judgment, said Order denying said motions, being rendered by this Court on the 29th

day of November, 1954, and to which action of the Court the defendant duly excepted.

"JOE B. THOMPSON,

and

"Ardmore, Oklahoma.

"JOHN B. OGDEN,
"By JOHN B. OGDEN,
(John B. Ogden).

"1408-9 Liberty Bank Bldg.,
Oklahoma City, Oklahoma.

"I hereby certify that I delivered a true and correct copy of said motion to Spencer Carver, Trustee, plaintiff c/o Biggers, Baker, Lloyd & Carver, 2020 Republic Bank Bldg., Dallas, Texas, and to John Ford, Assistant United States District Attorney, P. O. building, Dallas, Texas, by depositing in the United States Mail said notice addressed to the above parties.

"JOHN B. OGDEN,
(John B. Ogden)."

9. Bond for Appeal was filed and the case was presented to the United States Court of Appeals, Fifth Circuit, which Court entered the following judgment as shown in appendix, ix to xi.

10. Thereafter within time, Petition for Rehearing was filed in the Court of Appeals, Fifth Circuit, and by the Court denied without formal opinion as evidenced by a letter as follows:

"OFFICE OF THE CLERK
"UNITED STATES COURT OF APPEALS
Fifth Circuit

"John A. Feehan, Jr.,
Clerk

New Orleans 6, La.
July 29, 1955.

"John B. Ogden
"Attorney at Law
"Oklahoma City, Oklahoma

"Dear Sir:

"I beg to advise you that the Court today entered an order denying the Petition for the Rehearing in re— No. 15508, J. D. LEWIS v. SPENCER CARVER, Trustee, et al.

"No opinion was rendered in connection therewith.

"Very truly yours,
"/s/ John A. Feehan, Jr.
"John A. Feehan, Jr.,
"Clerk."

JURISDICTION

The order sought to be reviewed was entered by the Court of Appeals on June 30, 1955 (See paragraph 9 above), rehearing denied July 29, 1955. Jurisdiction of this Court is invoked under 28 U.S.C., Art. 1254 (1).

QUESTIONS PRESENTED

The question presented is whether the petitioners in this case had a right to appeal from the order of the United States District Court for the Northern District of Texas

in overruling the motion to vacate a judgment on the ground and for the reason that the judgment was void, and whether they had the right to appeal from the order of the court in refusing to vacate the marshal's sale of their property for inadequacy of purchase price. The United States Court of Appeals held that the petitioners could not appeal from the order refusing to vacate the judgment although the motion set out that the judgments were void.

On the merits the ultimate questions are:

(a) Whether under Rules of Civil Proecdure Rule Number 60 grants to the petitioners the right to appeal from the overruling of a motion to vacate a void judgment. The portion of the Rule relied on is Paragraph (b) of said Rule.

(b) Whether an appeal lies to the Circuit Court from the overruling of a motion to set aside a sale conducted by the marshal of the court for gross inadequacy of purchase price.

(c) Whether an appeal lies from an order of the District Court denying the petitioners the right to remove personal property from a building which has been sold at marshal's sale.

(d) Whether the pendency of an action between the same parties first filed and pending in the State Court, which action being *in rem*, precludes the Federal Court from taking jurisdiction..

(e) Whether the denial of a jury trial when properly requested defeats the jurisdiction of the trial court.

These questions we submit give to the petitioners the right to appeal from the orders overruling their motions.

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

Rule 60, Rules of Civil Procedure, Paragraph (b) is as follows:

"On motion, and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C., Sec. 1655, or to set aside a judgment for fraud upon the court. Writs of *coram nobis, coram vobis, audita querela,* and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

The Constitution of the United States, Amendment VII, is as follows:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

For an understanding of the issues herein presented, a chronological analysis of the proceedings in the Federal District Court and the Circuit Court of Appeals is essential.

There was filed in the State District Court at Dallas, Texas, a suit styled *J. R. Watkins Company, a corporation,* v. *J. D. Lewis* in which the plaintiff alleged and the pleadings reflected that Lewis had executed a note and mortgage to the J. R. Watkins Company, hereinafter referred to as plaintiff, for the sum of $35,000.00. That a deed of trust, in most jurisdictions called a "real estate mortgage", was executed covering certain property in Dallas, Texas, and involved in this litigation, being a brick air-conditioned business building and a residence. The defendant Lewis filed his answer, the pleadings had been settled, a pre-trial had been had, and the case was ready for trial. The plaintiff was represented by Spencer Carver, an attorney. The defendant in the State Court was represented by John B. Ogden of Oklahoma City, Oklahoma. The plaintiff through its attorney Spencer Carver bought another mortgage owned by J. D. Lewis and then went into the Federal Court and brought an action styled *Spencer Carver, Trustee,* v.

J. D. Lewis and Zelma Lewis. When this suit was filed in the United States District Court at Dallas, Texas, the J. R. Watkins Company, the plaintiff in the State Court, was made a defendant in the Federal Court and represented by the plaintiff, Spencer Carver, who was a regular attorney for the J. R. Watkins Company. J. D. Lewis was served with process and came to the United States District Court and filed a motion to dismiss for the reason that the same action was pending in the State District Court, the same *res*, the same debt, the same obligation, and alleged in his motion that the Federal Court did not have jurisdiction since the State Court already had jurisdiction of the litigation between Watkins Company and J. D. Lewis. The Watkins Company through its attorney, Spencer Carver, who was also the plaintiff, filed answer and cross-complaint against Lewis seeking to foreclose the same mortgage covering the same property, the same note, the same obligation in the Federal Court. The motion to dismiss having been presented by Lewis to the United States District Court was overruled. Lewis thereupon demanded in writing and in accordance with the Rules of the Federal Court, a demand for a jury trial since he pleaded payment and offsets therein detailed and set out both in the State Court and in the Federal Court. The trial judge stated from the bench that he would take a pen and scratch out the demand for a jury for the reason that he did not believe the defendant Lewis was entitled to a jury and there was no formal record made other than the statement above, which is admitted by all the parties. The case proceeded to trial in the United States Court and judgment was rendered in favor of the J. R. Watkins Company, the plaintiff in the State

Court, against the defendant J. D. Lewis foreclosing the mortgage and the case was still pending in the State Court at that time. J. D. Lewis filed a Motion for New Trial and a Motion to Stay Execution, which motions were overruled by the trial court, and being unable to supersede, the property was sold by the United States Marshal to the plaintiff Spencer Carver who held the dual role of plaintiff in the United States District Court and attorney for the defendant J. R. Watkins Company in the United States District Court. After that time the petitioner here, J. D. Lewis, filed in the United States District Court in the same case, a Motion to Vacate the Judgment for the reason that the judgment was void by virtue of the pendency of the case in the State Court between the same parties, involving the same *res* and the same indebtedness, and for the further reason that the United States District Court was without jurisdiction by reason of the fact that it denied J. D. Lewis, the petitioner here, defendant there, the right to a trial by jury. The defendant Lewis in that Court also filed a motion asking the Court to vacate the judgment on account of the gross inadequacy of price, for the reason that the property was worth according to the evidence offered in support of the motion and uncontradicted and undenied, approximately $30,000.00 and sold for slightly more than $2,000.00, the exact figures will be set out in the appendix. The defendant Lewis in the trial court, petitioner here, also filed a motion asking permission to remove an air-conditioner unit from the building which he alleged to be worth approximately $6,000.00, and all of the motions were by the United States District Court for the Northern District of Texas denied. The petitioner here then filed his Notice

of Appeal to the United States Court of Appeals, Fifth Circuit, and the case was appealed, and the appellee Spencer Carver, who is referred to as "Spencer Carver, trustee" and also the attorney for the J. R. Watkins Company, filed a motion to dismiss the appeal and the appeal was dismissed by the United States Court of Appeals, Fifth Circuit, which opinion is set out in appendix to this petition. The United States Court of Appeals holding that from the order of the Court denying the motions above enumerated the petitioner here cannot appeal, and the United States Court of Appeals did not decide whether or not the judgments were void or whether or not the sale was proper or whether or not the personal property should be removed.

Therefore, the question here presented is whether or not under Rule 60(b) the petitioner had the right to move to vacate the judgment against him for the reason that it was void and appeal from the order denying the motion, or whether the United States District Court's order was final and unappealable, also whether the petitioner here could appeal from the order of the Court denying his motion to vacate the sale on account of inadequacy of price and have the same reviewed by the United States Court of Appeals; also whether or not the petitioner here had the right to appeal from the order of the District Court denying him the right to remove from the building personal property, namely an air-conditioner, or whether or not the District Court's order was final on all of these matters and could not be appealed to the United States Court of Appeals.

REASONS FOR GRANTING THE WRIT

I.

When a state court acquires jurisdiction of the *res* and the parties the United States Court cannot acquire jurisdiction. The United States Court is prohibited from thereafter assuming jurisdiction over the same *res* between the same parties.

While the case of *J. R. Watkins Company* v. *J. D. Lewis* was pending in the State District Court in Dallas, Texas, with full and complete jurisdiction over the *res* and the parties, the United States Court could not usurp or take away the jurisdiction of the State Court and had no jurisdiction whatsoever to exercise jurisdiction over the same *res* between the same parties. The record in this case shows that the State Court case was pending and Spencer Carver as a trustee thereafter brought an action in the United States Court wherein he sought to have the United States Court litigate the same matter between the same parties as was then pending in the State Court over the objection and protest of the petitioner J. D. Lewis.

In the case of *Palmer* v. *State of Texas*, 212 U.S. 118, 29 Sup. Ct. 230, 53 L. Ed. 435, United States Supreme Court, the Court stated:

> "If the state court had acquired jurisdiction over the property by the proceedings for the appointment of its receiver, and had not lost the same by the subsequent proceedings, then, upon well-settled principles, often recognized and enforced in this court, there should be no interference with the action of the state courts while thus exercising its authorized jurisdiction. The Federal and state courts exercise jurisdiction within the same territory, derived from and controlled by

separate and distinct authority, and are therefore required, upon every principle of justice and propriety, to respect the jurisdiction once acquired over property by a court of the other sovereignty. If a court of competent jurisdiction, Federal or State, has taken possession of property, or by its procedure has obtained jurisdiction over the same, such property is withdrawn from the jurisdiction of the courts of the other authority as effectually as if the property has been entirely removed to the territory of another sovereignty. *Wabash R. Co.* v. *Adelbert College,* 208 U.S. 38, 52 L.Ed. 379, 28 Sup. Ct. Rep. 182, and previous cases in this court, cited therein at page 54."

In the case of *Toucey* v. *New York L. Ins. Co.,* 314 U.S. 118, 62 Sup. Ct. 139, 86 L. Ed. 100, 137 A.L.R. 967, the United States Supreme Court stated in part as follows:

"And where a state court first acquires control of the *res,* the Federal courts are disabled from exercising any power over it, by injunction or otherwise."

This Court, in *Covell* v. *Heyman,* 111 U.S. 176, 182, 28 L. Ed. 390, 392, 4 Sup. Ct. Rep. 355, said:

"The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is something more. It is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space,

> they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues."

Under the foregoing decisions of this Court the State District Court had retained and held exclusive jurisdiction over the *res* and the parties and the United States Court had no right to invade or attempt to invade the jurisdiction of the State Court and the procedure attempted to be followed by the respondent herein was merely an effort to evade and circumvent the jurisdiction of the State Court in Dallas, Texas, and try out the same issues in the Federal Court and foreclose the same mortgage in the Federal Court and determine the rights of J. D. Lewis and the J. R. Watkins Company in the Federal Court rather than in the State Court, which State Court had exclusive jurisdiction. Therefore, the United States District Court for the Northern District of Texas never acquired and never had jurisdiction of any kind, and for that reason the judgment was absolutely void and since it was a void judgment the petitioner here had the right to attack the judgment at any time he saw fit.

Rule 60(b), Rules of Civil Procedure, gave to the petitioner here the right to file a motion to vacate the void judgment and when the motion was denied by the trial

court, he had the right to appeal therefrom, but the United States Court of Appeals has held in this case that he did not have the right to appeal and this Court should determine whether a litigant has the right to appeal from a motion to vacate a void judgment. To permit the order of the United States Court of Appeals to stand in this case would simply mean that the petitioner here would have no right to question the validity of the judgment. We submit that this Court should now grant certiorari so that the important question raised above may be determined and that the petitioner should be allowed to appeal from the order denying his motion to vacate a void judgment.

II.

The denial of a jury trial to the petitioner constituted a denial of due process of law and violated petitioner's constitutional right.

The defendant in the United States District Court filed a proper demand for a jury trial and the same was denied. We think this clearly violated the Constitutional rights of the petitioner and also his rights under Rule 38, Rules of Civil Procedure, which Rule is as follows:

> "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

In the case of *Bass* v. *Hoagland,* United States Court of Appeals, Fifth Circuit, 172 F.2d 205, quoting from the body of the opinion, the Court used the following language:

"* * * We believe that a judgment, whether in a civil or criminal case, reached without due process of law is without jurisdiction and void, and attackable collaterally by habeas corpus if for crime, or by resistance to its enforcement if a civil judgment for money, because the United States is forbidden by the fundamental law to take either life, liberty or property without due process of law, and its courts are included in this prohibition. In *Johnson* v. *Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357, the court was declared to have lost its jurisdiction in a trial for crime when it denied the constitutional right to the assistance of counsel. The right of jury trial, if not waived but denied after demand, the judge ursurping the function of the jury, would seem to be similarly an unconstitutional abuse of power. * * * Rule of Civil Procedure 38 requires that the right be asserted by a demand for it. We have found no federal case which has treated as a mere procedural error a flat denial of a jury trial demanded in a civil case, though we have found none holding its denial to be by itself a good ground of collateral attack."

It will thus be seen that the denial of a jury trial in this case deprived the petitioner here of due process of law under the Rules of Civil Procedure as well as under the Constitution of the United States. Therefore, the judgment rendered in the United States District Court was void. After the petitioner here filed his motion to vacate the judgment for these reasons, which facts are undenied and undisputed, then he surely had the right to appeal to the United States Court of Appeals and there have the order of the District Court denying his motion to vacate the void judgment reviewed but the United States Court of Appeals said he cannot appeal regardless of whether the judgments

are void and clearly under all of the constitutional and statutory provisions he had the right to a trial by jury and this was denied to him. He moved to vacate the judgment by reason thereof, and his motion was denied. Consequently he appealed, the appeal dismissed, and this leaves the petitioner without any rights whatsoever and his property will be taken and has been taken without due process of law.

III.

Denial of right to appeal to the United States Circuit Court from order refusing to vacate marshal's sale for inadequacy of purchase price was denial of due process of law.

After the marshal's sale, the petitioner here moved to vacate the sale and offered to pay all costs and to do equity in any manner required by the Court. The motion was denied. The business building sold for approximately $2,000.00 and was worth approximately $30,000.00 on the market. The residence sold for approximately $700.00 and was worth approximately $5,500.00. After the Court overruled the motion to vacate the sale, the petitioner appealed to the United States Court of Appeals. The United States Court of Appeals refused to review the matter saying this was not an appealable order. In this we think the United States Court of Appeals denied petitioner due process of law. Rule 60, Rules of Civil Procedure, provides for relief and we feel that certainly the petitioner here was entitled to have his case reviewed on appeal. To hold otherwise would be to take away from the petitioner the right of review and we will not here discuss the merits, but merely

the question as to whether or not the petitioner had the right to have this matter reviewed in the appellate court.

The other motion asking leave to remove personal property was likewise denied by the United States Court and from that order an appeal was perfected which was denied. We feel that the same Rule applies to these orders with reference to the right of appeal. These matters will be fully briefed, but in this petition it is seriously urged that the Court should grant the petition and review this case by reason of the fact that the petitioner here was denied due process of law in that he was denied the right to appeal from these motions as well as the motion to vacate the void judgment complained of.

SUMMARY AND CONCLUSION

Very briefly, this litigation presents this type or kind of a situation: The J. R. Watkins Company held a note and mortgage, called in Texas a "deed of trust", covering a brick office building and a residence in the City of Dallas. The Watkins Company filed a suit in the State District Court to foreclose. The defendant in that case, J. D. Lewis, petitioner here, filed his answer and set up that he did not owe the note by reason of certain off-sets and credits. After the issues were joined and a pre-trial had, Spencer Carver, who was the attorney for J. R. Watkins Company, filed a suit in the United States District Court styled *Spencer Carver, Trustee,* v. *J. D. Lewis et al.,* in which he alleged that he had bought a mortgage from a bank and that J. D. Lewis was the mortgagor and he sued the J. R. Watkins Company, his client, and had the service made by the

marshal upon his law firm or upon him, and then he filed an answer for J. R. Watkins Company in the United States District Court and asserted and set up the mortgage and note, the same mortgage and note as pleaded by him in the State District Court, in an effort to get jurisdiction in the United States Court. He made the United States a party defendant on account of an alleged tax lien. The United States District Attorney moved to dismiss the case, the tax lien was paid off, the petitioner here, defendant in the Federal Court in Dallas, moved to dismiss on account of the pendency of the case in the State Court. This motion was overruled. The defendant Lewis, petitioner here, demanded a jury trial in accordance with the Rules of Civil Procedure which was denied, and judgment rendered against him. A motion for new trial was filed and overruled. A motion for stay of execution was filed and overruled and the property was sold under the judgment of the United States District Court foreclosing the Watkins mortgage. A motion to vacate the sale was filed for the reason that the judgment was void on account of the pendency of the action in the State Court and on account of the fact that a jury trial was denied, and the motion to set aside the sale also upon the ground of inadequacy of price, and a motion to remove an air-conditioner from the building. After these motions were denied by the United States Court in Dallas, the petitioner here, J. D. Lewis, appealed to the United States Court of Appeals and the United States Court of Appeals simply said that Lewis, the petitioner here, could not appeal.

Therefore, this appeal presents a very important question to this Court for decision, and if certiorari is granted,

we shall ask this Court to do the following: to either direct the United States Circuit Court of Appeals to entertain the appeal and decide whether or not the judgment rendered by the United States District Court was void or ask this Court to hold that the judgment rendered by the United States District Court in Dallas, Northern District of Texas was void, and ask this Court to direct the United States Court of Appeals to entertain the appeal from the order of the United States District Court refusing to vacate the sale on account of inadequacy of price, and also from the order refusing the motion to permit the petitioner to remove certain personal property. If the Court grants either of the first two, it may be unnecessary to consider the latter by virtue of the fact that if the judgment is vacated it will have the effect of vacating the sale, and all equities can thereafter be adjusted since no rights of third parties have intervened.

Respectfully submitted,

JOHN B. OGDEN,
1408-9 Liberty Bank Building,
Oklahoma City, Oklahoma,
Attorney for Petitioner.

August, 1955.

APPENDIX I

JUDGMENT

In the United States District Court for the Northern District of Texas, Dallas Division.

Spencer Carver, Trustee,

vs. Civil Action No. 5511.

United States of America, et al.

On this the 2nd day of June, 1954, came on regularly to be heard the above entitled and numbered cause wherein Spence Carver, Trustee, is plaintiff, and United States of America is defendant and cross plaintiff, J. D. Lewis and wife, Zelma Lewis are defendants and cross plaintiffs, J. R. Watkins Company, a corporation is defendant and cross plaintiff, City of Dallas, a Municipal Corporation of Dallas County, Texas, is defendant and cross plaintiff, and Ben Gentle, Tax Assessor-Collector of Dallas County, Texas, is defendant and cross plaintiff, and came all parties and announced ready for trial, and the Court being of the opinion and finding that the relief prayed for by the plaintiff, defendants, and cross plaintiffs should be granted as herein set out, and that all other relief should be denied.

It Is Therefore Ordered, Adjudged and Decreed by the Court that Spencer Carver, Trustee, recover of J. D. Lewis and Zelma Lewis, the sum of $5,109.14, together with the establishment and foreclosure of the lien on the property described as:

Lying and being situated in the County of Dallas, and the State of Texas, and being the East ½ of Lot 1, Block 5, of Subdivision of W. H. Gaston Homestead, and also known as Block 816, according to the Official Map of the City of Dallas.

and which said lien shall be superior to the lien hereinafter adjudged in favor of R. J. Watkins Company and the United States of America, but shall be inferior to the liens hereinafter adjudged in favor of City of Dallas and Ben Gentle, Tax Assessor-Collector.

It Is Further Ordered, Adjudged and Decreed by the Court that the J. R. Watkins Company, a corporation, recover from J. D. Lewis, $44,243.45, together with the establishment and foreclosure of a lien upon the property described as:

Tract One: Lying and being situated in the County of Dallas and State of Texas, being the East ½ of Lot 1, Block 5 of Subdivision W. H. Gaston Homestead Official Map of the City of Dallas,

Tract Two: Lying and being situated in the County of Dallas and State of Texas, being Lot 11, Block 2 of Mount Auburn, an Addition to the City of Dallas as per map thereof of record in the Map Records of Dallas County, Texas

and said lien shall be superior to the lien hereinafter adjudged to the United States of America, but shall be inferior to the lien hereinabove adjudged to Spencer Carver, Trustee, and the lien hereinafter adjudged in favor of the City of Dallas and Ben Gentle, Tax Assessor-Collector.

It Is Further Ordered, Adjudged and Decreed by the Court that the United States of America, recover of J. D. Lewis, $13,301.45, together with the establishment and foreclosure of the lien upon the property described as:

Tract One: Lying and being situated in the County of Dallas and State of Texas, being the East ½ of Lot 1, Block 5 of Subdivision W. H. Gaston Homestead and also known as Block 816, according to the Official Map of the City of Dallas,

Tract Two: Lying and being situated in the County of Dallas and State of Texas, being Lot 11, Block 2 of Mount Auburn, an Addition to the City of Dallas as per map there of of record in the Map Records of Dallas County, Texas.

and said lien shall be inferior to the liens hereinabove adjudged to Spencer Carver, Trustee, and to the J. R. Watkins Company and superior to the liens hereinafter adjudged in favor of City of Dallas, in the amount of $1,000.08 and in the amount of $104.65, being taxes for 1953 and 1954, and Ben Gentle, Tax Assessor-Collector in the amount of $160.21 and in the amount of $21.50, being taxes for 1953, but shall be inferior to the lien hereinafter adjudged to City of Dallas in the amount of $1309.88, being taxes for 1952 and prior years, and the lien hereinafter adjudged to Ben Gentle, Tax Assessor-Collector in the amount of $687.41 and in the amount of $22.36, being taxes for 1952 and prior years.

It Is Further Ordered, Adjudged and Decreed by the Court that the City of Dallas recover from J. D. Lewis $1,309.88, together with the establishment and foreclosure of its lien upon the property described as:

Tract One: Lying and being situated in the County of Dallas and State of Texas, being the East ½ of Lot 1, Block 5 of Subdivision W. H. Gaston Homestead and also known as Block 816, according to the Official Map of the City of Dallas

which lien shall be superior to the liens hereinabove adjudged to Spencer Carver, Trustee, and J. R. Watkins Company and the United States of America as taxes for 1952 and prior years, but shall be co-equal to the liens hereinafter adjudged to Ben Gentle, Tax Assessor-Collector.

It Is Further Ordered, Adjudged and Decreed by the Court that the City of Dallas recover from J. D. Lewis,

the sum of $1,000.08, together with the establishment and foreclosure of the lien upon the property described as:

Tract One: Lying and being situated in the County of Dallas and State of Texas, being the East ½ of Lot 1, Block 5 of Subdivision W. H. Gaston Homestead and also known as Block 816, according to the Official Map of the City of Dallas

which lien shall be superior to the lien hereinabove adjudged to Spencer Carver, Trustee, and J. R. Watkins Company and shall be inferior to the lien hereinabove adjudged to the United States of America, and shall be co-equal with the lien hereinafter adjudged to Ben Gentle, Tax Assessor-Collector.

It Is Further Ordered, Adjudged and Decreed by the Court that the City of Dallas recover of J. D. Lewis, the sum of $104.65, together with the establishment and foreclosure of its lien on the property described as:

Tract Two: Lying and being situated in the County of Dallas and State of Texas, being Lot 11, Block 2 of Mount Auburn, an Addition to the City of Dallas as per map thereof of record in the Map Records of Dallas County, Texas

which lien shall be superior to the lien hereinabove adjudged to Spencer Carver, Trustee and J. R. Watkins Company, and shall be inferior to the lien hereinabove adjudged to the United States of America, but shall be co-equal with the lien hereinafter adjudged to Ben Gentle, Tax Assessor-Collector.

It Is Further Ordered, Adjudged and Decreed that Ben Gentle, Tax Assessor-Collector have judgment against J. D. Lewis in the amount of $687.41 together with the establishment and foreclosure of its lien on the property described as:

Tract One: Lying and being situated in the County of Dallas and State of Texas, being the East ½ of Lot 1, Block 5 of Subdivision W. H. Gaston Homestead Official Map of the City of Dallas

which lien shall be superior to the lien hereinabove adjudged to Spencer Carver, Trustee and J. R. Watkins Company and the United States of America, as taxes for 1952 and prior years, and shall be co-equal with the liens hereinabove adjudged to the City of Dallas.

It Is Further Ordered, Adjudged and Decreed by the Court that Ben Gentle, Tax Assessor-Collector, recover judgment against J. D. Lewis in the amount of $160.21, together with the establishment and foreclosure of the lien upon the property described as:

Tract One: Lying and being situated in the County of Dallas and State of Texas, being the East ½ of Lot 1, Block 5 of Subdivision W. H. Gaston Homestead and also known as Block 816, according to the official map of the City of Dallas

which lien shall be superior to the liens hereinabove adjudged to Spencer Carver, Trustee, and J. R. Watkins Company and shall be inferior to the lien hereinabove adjudged to the United States of America, and shall be co-equal with the liens hereinabove adjudged to the City of Dallas.

It Is Further Ordered, Adjudged and Decreed by the Court that Ben Gentle, Tax Assessor-Collector, recover from J. D. Lewis, the sum of $22.36, together with establishment and foreclosure of its lien on the property described as:

Tract Two: Lying and being situated in the County of Dallas, and State of Texas, being Lot 11, Block 2 of Mount Auburn, an Addition to the City of Dallas as per map thereof of record in the Map Records of Dallas County, Texas

which lien shall be superior to the lien hereinabove adjudged to Spencer Carver, Trustee, and J. R. Watkins Company and United States of America, as 1952 taxes, but shall be co-equal with the liens hereinabove adjudged to the City of Dallas.

It Is Further Ordered, Adjudged and Decreed by the Court that Ben Gentle, Tax Assessor-Collector, recover from J. D. Lewis, the sum of $21.50, together with the establishment and foreclosure of the lien upon the property described as

Tract Two: Lying and being situated in the County of Dallas and State of Texas, being Lot 11, Block 2 of Mount Auburn, an Addition to the City of Dallas as per map thereof of record in the Map Records of Dallas County, Texas

which lien shall be superior to the liens hereinabove adjudged to Spencer Carver, Trustee and J. R. Watkins Company, but shall be inferior to the lien hereinabove adjudged the United States of America, and shall be co-equal with the liens hereinabove adjudged to the City of Dallas.

It Is Further Ordered, Adjudged and Decreed by the Court that all costs herein be and the same are hereby taxed to the plaintiff, Spencer Carver, Trustee.

It Is Further Ordered, Adjudged and Decreed by the Court that the Clerk shall issue an Order of Sale of the property described as:

Tract One: Lying and being situated in the County of Dallas and State of Texas, being the East ½ of Lot 1, Block 5 of Subdivision W. H. Gaston Homestead and also known as Block 816, according to the Official Map of the City of Dallas

Tract Two: Lying and being situated in the County of Dallas and State of Texas, being Lot 11, Block 2 of Mount Auburn, an Addition to the City of Dallas as per map

there of of record in the map records of Dallas County, Texas,

in accordance with the law, and the proceeds thereof shall be paid and delivered in accordance with this judgment, and should said proceeds fail to discharge this judgment in full, each party herein shall have execution and all other process for the balance remaining unpaid on the judgment herein rendered, to which judgment each party may have its exception.

WM. H. ATWELL,
United States District Judge.

APPENDIX II

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15508

J. D. LEWIS,

Appellant,

VERSUS

SPENCER CARVER, Trustee, ET AL.,

Appellees.

Appeal from the United States District Court for the Northern District of Texas.

(June 30, 1955.)

Before HUTCHESON, Chief Judge, JONES, Circuit Judge, and CHRISTENBERRY, District Judge.

HUTCHESON, Chief Judge: On June 2, 1954, the court from which this appeal comes entered a judgment in the aggregate amount of $64,978 on several claims against J. D. Lewis, fixed the priorities of the several liens securing same, and ordered their foreclosure according to law on the East one-half of Lot 1, Block 5, Subdivision of W. H. Gaston Homestead and Lot 11, Block 2, Mount Auburn Addition, both in Dallas, Texas, and execution in favor of

each plaintiff for the balance remaining unpaid after crediting the proceeds of the foreclosure sale.

Motions for new trial and for stay of execution on the judgment were filed by Lewis and wife, and denied on June 28, 1954, and, pursuant to an order of sale, the properties were, on September 14, 1954, sold by the United States Marshal.

Thereafter, on November 4, 1954, J. D. Lewis and wife filed three motions in the cause: (1) a motion to vacate the judgment on the ground that the state court had first acquired jurisdiction of the *res*, and the federal court, therefore, was without jurisdiction to proceed; (2) a motion to set aside the sale for gross inadequacy of price; and (3) a motion to be allowed to remove from the property sold, as a removable fixture and not covered by the mortgage, an air-conditioning plant.

On November 29, 1954, the court entered an order denying each of the motions, and movants appealing therefrom are here urging upon us: that each of them should have been granted; and that the orders appealed from must be reversed.

Appellees insisting that on their merits the motions are wholly without substance or merit, urge upon us in a motion to dismiss, filed March 12, 1955, which we have considered with the merits of the case, that the motion to vacate the judgment was not an appealable order, and, filed as it was after the judgment had become final, it did not extend the time for appealing from it under *United States* v. *Muschany*, 156 F(2) 196; *French* v. *Jeffries*, 161 F(2) 97; and similar cases; and that the appeal as a whole should be dismissed because there is no merit or substance in any of the points made and because the appellant, without cause and without obtaining an order for delay, has failed to diligently prosecute his appeal and has misused and abused the rules of procedure for the purpose of obstructing the collection of the final judgment.

We agree that the order denying the motion to set aside the judgment, filed after it had become final, is not an appealable order.

As to the other point in appellees' motion, that the appeal is without substance as to any of the orders appealed from, and that, while we have the discretion to excuse the failure to prosecute an appeal with diligence and in accordance with the rules if a search of the record shows the appeal to be meritorious,[1] an examination of the briefs and record in this case shows that, as contended by appellees in their motion, the appeal is without merit or substance and that it would be an abuse of our discretion to entertain the appeal, notwithstanding the appellant's *dilitoriness*, only to hold it completely without merit.

The motion to dismiss will, therefore, be GRANTED and the appeal will be DISMISSED.

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[1] *Arline* v. *Brown*, 181 F(2) 183; *Ispass* v. *Pyramid*, 330 U.S. 695.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Fifth Circuit.